

## Second Supplement to Memorandum 2023-10

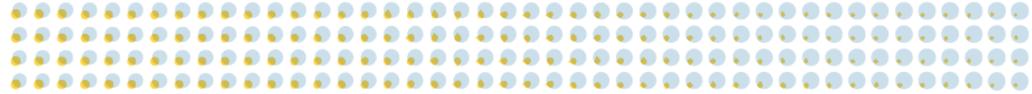
### **Equal Rights Amendment: Presentation**

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Dean Brad Sears gave a slide presentation to the Commission at the February 16, 2023 meeting, entitled "Discrimination Against LGBTQ People as Sex Discrimination." Dean Sears gave permission to reproduce his slides. They are attached.

Respectfully submitted,

Kristin Burford  
Senior Staff Counsel



# Discrimination against LGBTQ people as sex discrimination

## **Brad Sears**

Associate Dean of Public Interest Law

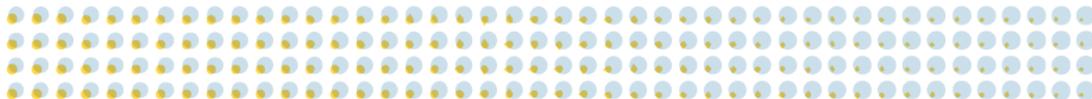
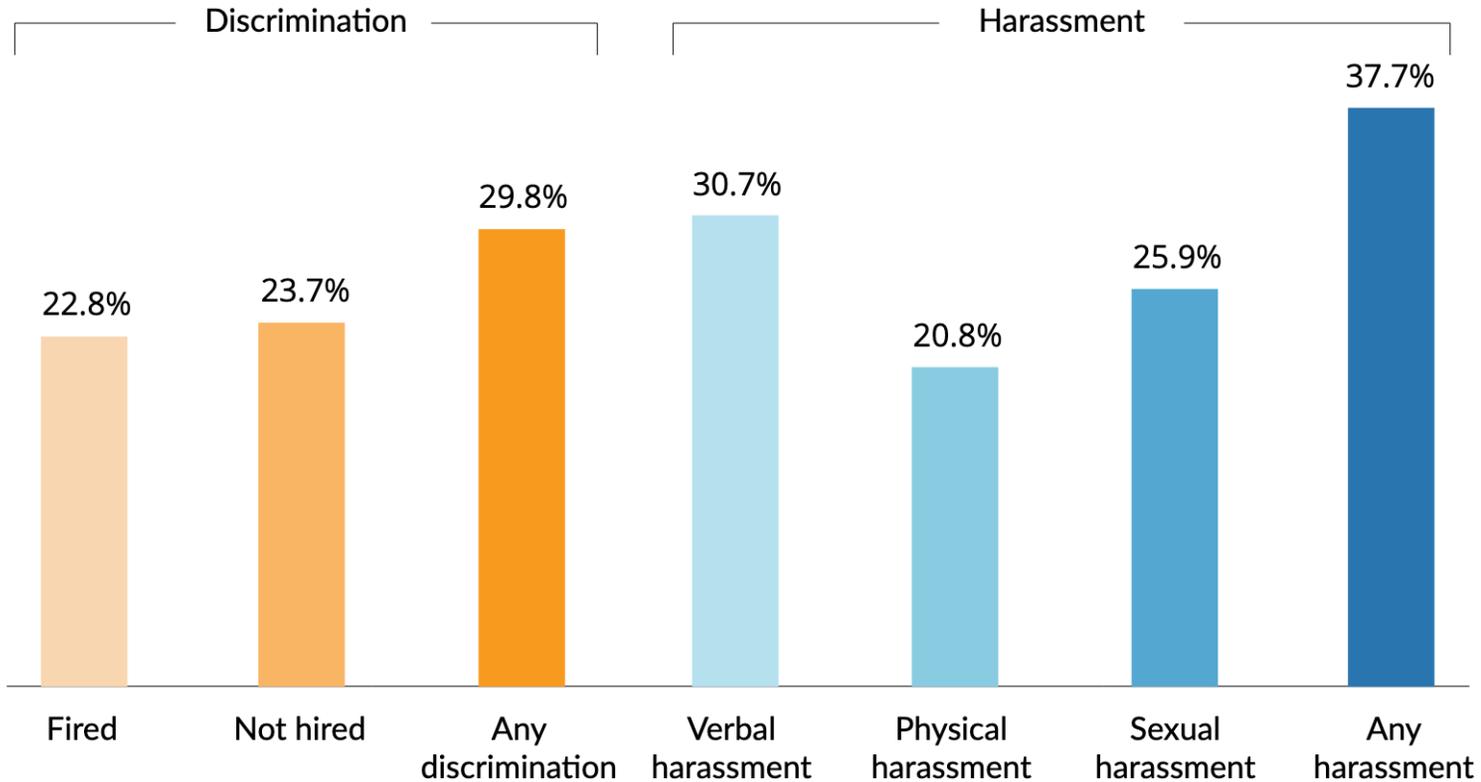
Founding Executive Director, The Williams Institute

UCLA School of Law

February 16, 2023

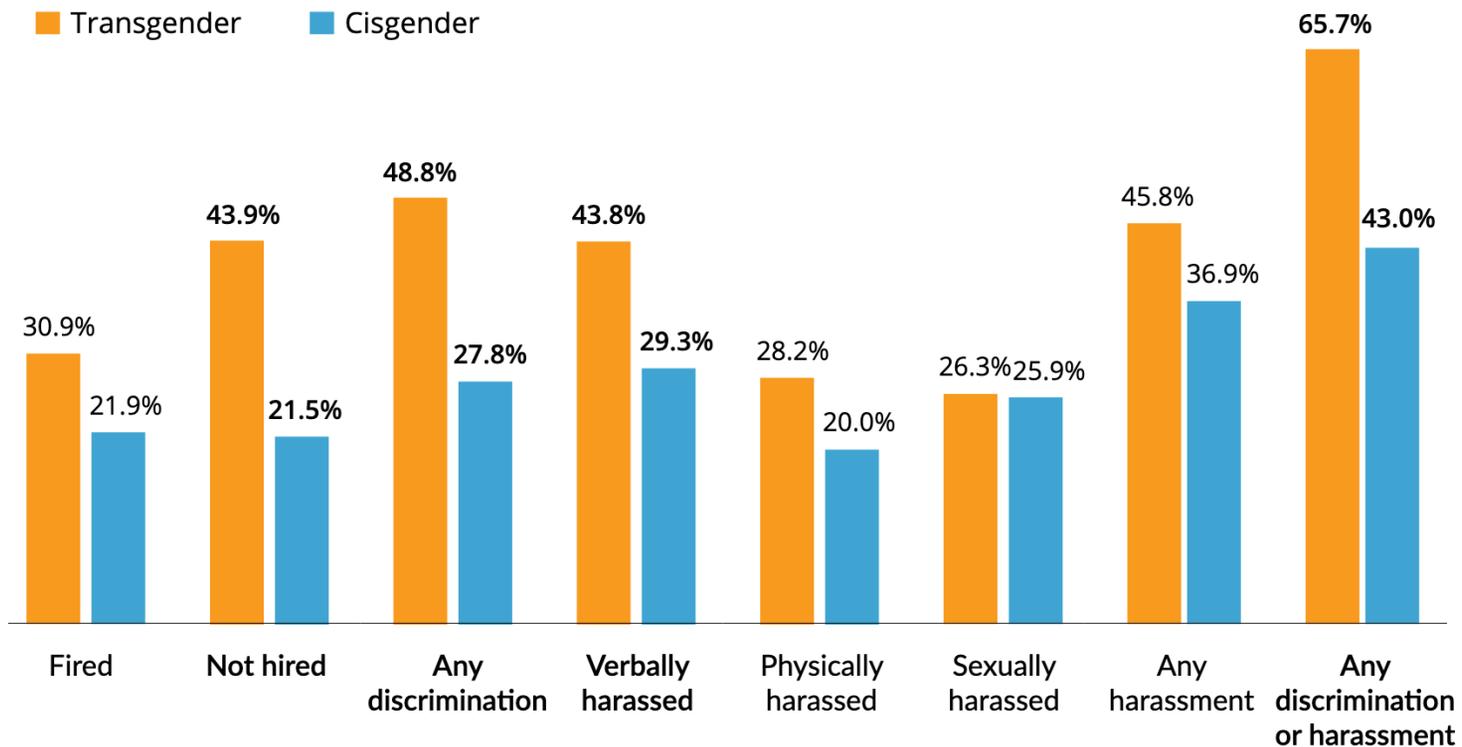
## EVIDENCE OF DISCRIMINATION AGAINST LGBTQ PEOPLE

Lifetime experiences of discrimination and harassment

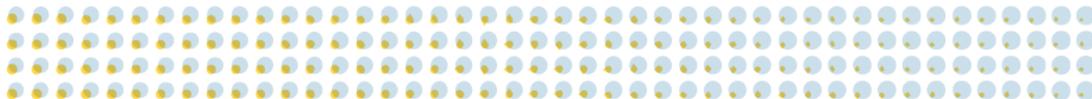


## EVIDENCE OF DISCRIMINATION AGAINST LGBTQ PEOPLE

Lifetime experiences of discrimination and harassment, cis compared to trans employees

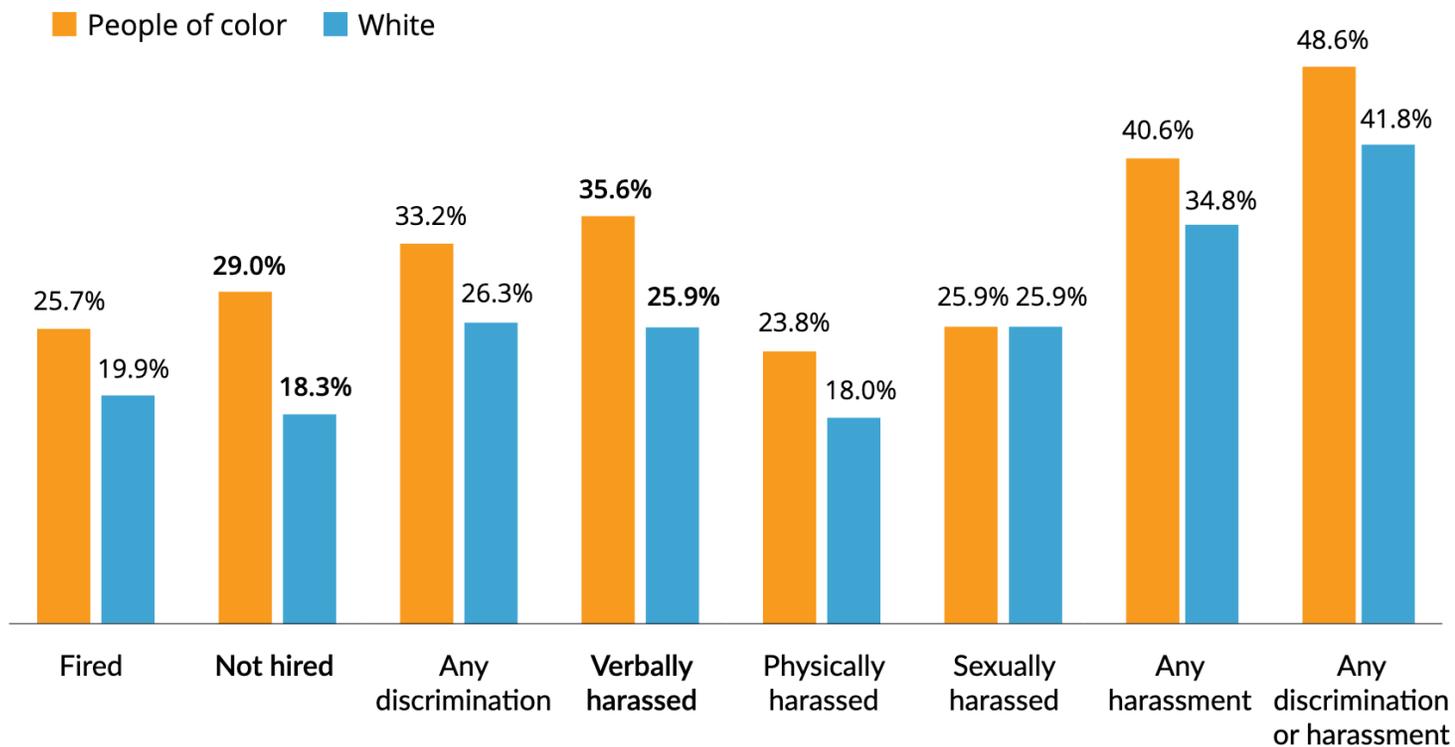


Bold text indicates statistically significant difference

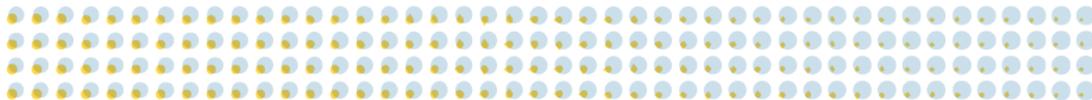


# INTERSECTIONAL FORMS OF DISCRIMINATION AGAINST LGBTQ PEOPLE

Experiences of discrimination and harassment, white compared to POC employees



Bold text indicates statistically significant difference



## EXAMPLES FROM CALIFORNIA

Working at a bank, other employees and bankers would often make jokes about how gay people talk.

-White cis gay male from CA

My coworkers kept saying “you’re going to hell”, “god doesn’t accept you”, “no one likes you.”

- Biracial cis bi woman from CA

I have been told ... that the way I am is not natural or part of the order of things that God dictates.”

- Black cis bi woman from CA

I worked for [a national supermarket chain] for eight years as a cashier [and was] a very fast learner... I asked one manager if I can move up to management and they said... that I was a ‘cake decorator’... [and] promote[d] a person that had been working 6 months instead.

- Latinx cis gay man from CA

“[It was] a very uncomfortable work environment . . . and people would get weird and try to change the conversation when my gayness was brought up in some way . . . and feeling like I had to keep quiet about my sexual orientation.”

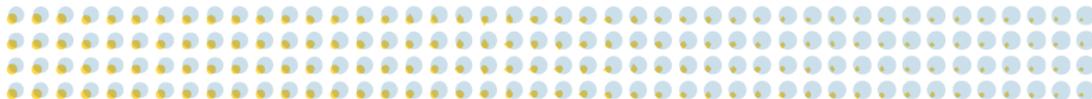
-Latinx cis lesbian from CA



## SEX DISCRIMINATION AND SOGI DISCRIMINATION ARE OFTEN OVERLAPPING AND INTERTWINED

Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

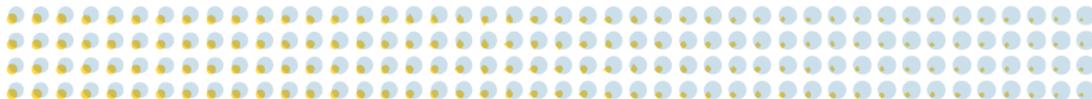
- Textualist approach
- “We agree that homosexuality and transgender status are distinct concepts from sex. But, as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”



## SEX DISCRIMINATION AND SOGI DISCRIMINATION ARE OVERLAPPING AND INTERTWINED

### Theories of SOGI discrimination as sex discrimination

- Discrimination against LGBTQ people is often bound up in perceptions and expectations related to gender norms and stereotypes.
- Discrimination against someone because of the sex of their partner is associational sex discrimination.
- Difference in treatment before and after gender transition is discrimination based on sex. Consider similarities to discrimination based on religion after conversion.



## SEX DISCRIMINATION AND SOGI DISCRIMINATION ARE OFTEN OVERLAPPING AND INTERTWINED

Examples of pre-Bostock cases involving gender identity discrimination

- Transgender female police officer told to “stop wearing makeup and act more masculine,” and to correct “grooming deficiencies.” *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).
- Transgender female firefighter suspended for not acting “masculine enough.” *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2005).



## SEX DISCRIMINATION AND SOGI DISCRIMINATION ARE OFTEN OVERLAPPING AND INTERTWINED

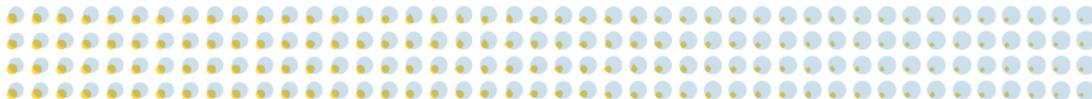
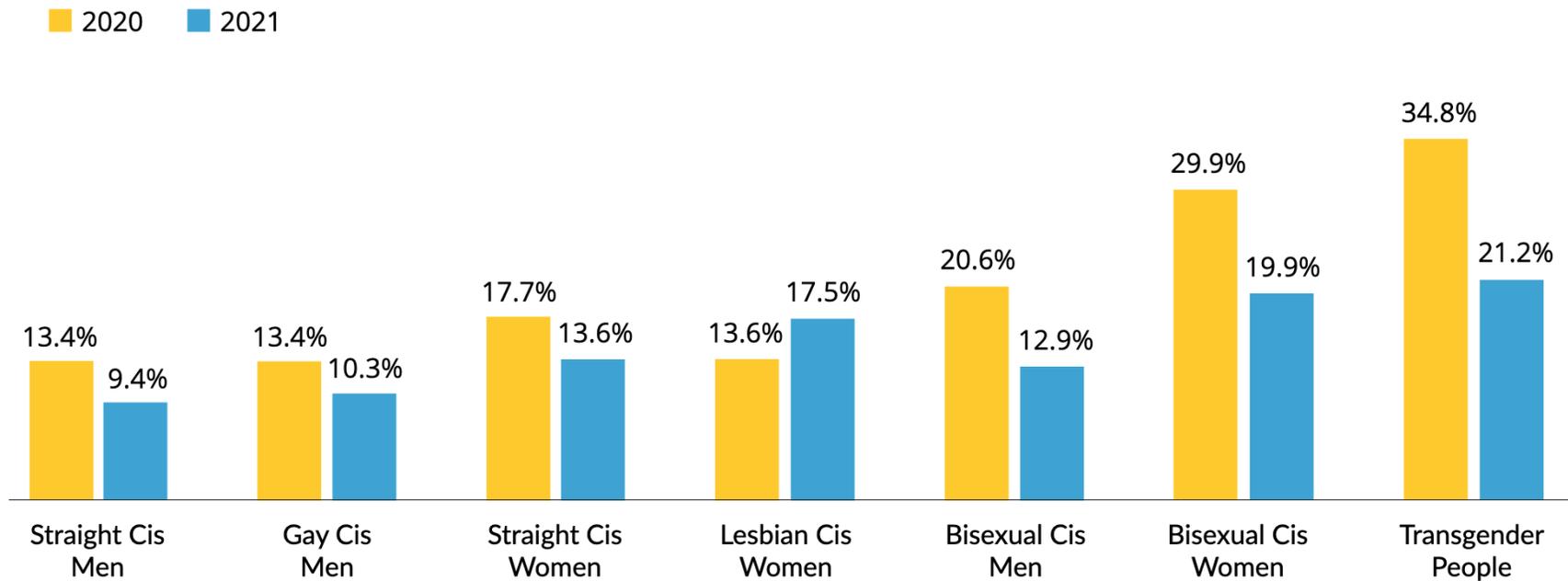
Examples of pre-Bostock cases involving sexual orientation discrimination

- Gay employee terminated because of his sexual orientation; court holds that “a line between sex discrimination and sexual orientation discrimination is ‘a distinction without a difference. Forcing an employee to fit into a gendered expectation– whether that expectation involves physical traits, clothing, mannerisms or sexual attraction-- constitutes sex stereotyping and, under Price Waterhouse, violates Title VII.” EEOC. V Scott Med. Health Ctr., 217 F. Supp. 3d 834 (W.D. Pa. 2016).
- Lesbian employee harassed by supervisor whose comments included, “Are you the man?,” “I thought you wore the pants,” “Do you wear the d\*\*\* in the relationship?” and commenting that her shoes were “men’s shoes.” Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Or. 2002).



# DISCRIMINATION BASED ON SEX AND SOGI CAN HAVE COMPOUNDING NEGATIVE EFFECTS

Poverty rate by LGBT status and gender



# WHEN OTHER MARGINALIZED CHARACTERISTICS ARE CONSIDERED, THE IMPACT IS OFTEN EVEN MORE PRONOUNCED

Income disparity between LGQ white women and women of color

